IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

SALVADOR PRIETO,	)	
	)	
Plaintiff,	)	**No. 13 CH 10818**
	)	
v.	)	
	)	**Judge Thomas R. Allen**
GARRY McCARTHY, SUPERINTENDENT OF THE CHICAGO POLICE DEPARTMENT, and THE POLICE BOARD OF THE CITY OF CHICAGO,	)	**Calendar 10**
	)	
Defendants.	)	

Memorandum Opinion and Order

This matter comes before the Court on Plaintiff's Petition for Administrative Review. Petitioner, Salvador Prieto, seeks judicial review of a final administrative decision issued by Defendant, the Police Board of the City of Chicago ("Board"), terminating his employment as an Officer with the Chicago Police Department. On February 21, 2013, the Board issued its Findings and Decisions ("Board's Decision") discharging Prieto for various rules of conduct violations that occurred during a narcotics investigation four years prior at 4740 S. Prairie Avenue on February 4, 2009. Defendant, Garry McCarthy, Superintendent of the Chicago Police Department ("Superintendent"), levied charges against Officer Prieto, five fellow officers, and their Sergeant on July 2, 2012, over three years later.

The Superintendent alleged that Officer Prieto and his colleagues performed a search of the basement apartment of a known drug dealer in violation of the Fourth Amendment. The Superintendent claimed that the officers entered the apartment without a warrant and coerced the leaseholder into signing a consent to search form only after the officers had concluded their search. As a result, the officers were charged with entering the apartment without authority.

mistreating the residents, coercing the leaseholder into giving consent, and conducting an illegal search.[1] The officers were also charged with making false statements during the aftermath of this investigation. Specifically, Officer Prieto was charged with 40 violations of the following Rules and Regulations of the Chicago Police Department:

Rule 1 – violation of law or ordinance;

Rule 2 – an action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department;

Rule 6 – disobedience of an order or directive, whether written or oral;

Rule 8 – disrespect to or maltreatment of any person, while on or off duty;

Rule 9 – engaging in any unjustified verbal or physical altercation with any person, while on or off duty;

Rule 14 – making a false report, written or oral; and

Rule 38 – unlawful or unnecessary use or display of a weapon.

Prieto petitions this Court on three grounds: (1) that the Superintendent's delay in bringing charges violated his right to due process, the doctrine of *laches*, General Order 90-03, and Section 2-57-070 of the Municipal Code; (2) that the Board's Decision is against the manifest weight of the evidence; and (3) that the Board's termination of Prieto's employment was arbitrary and capricious. After considering the pleadings, memoranda, Administrative Record, and oral arguments of counsel, and further being fully advised in the premises, the Court finds as follows:

I. Factual Background

[1] Sgt. Terrazas was separately charged with failing to respond and not being present at the search, even though his duties required him to be present.

On February 3, 2009, Prieto reeeived information from an anonymous informant regarding narcotics at the apartment of a known drug dealer, Willie Hines, who resided at 4740 S. Prairie Avenue in Chicago. Prieto and his fellow officers were familiar with Mr. Hines from a previous drug arrest and search warrant exeeution at that apartment. Prieto relayed this information to his colleagues, and on February 4, 2009 Petitioner and members of the 263 tactical team proceeded to that address to investigate the anonymous tip. In addition to Prieto, the members of the 263 tactical team included Sergeant Jesse Terrazas and Officers Alejandro Dela Cruz, Daniel Gomez, Marvin Bonds, Gonzalo Escobar, and Christopher Moore. The officers did not obtain a search warrant prior to their dispatch to the premises, nor did they have an arrest warrant for Mr. Hines. It is this narcoties investigation that gave rise to the proeeedings against Officer Prieto, his Sergeant, and fellow members of the tactical unit. Though Prieto and his colleagues strenuously dispute the following aecount, it is a summary of the Board's factual findings concerning the events that occurred inside 4740 S. Prairie that afternoon.

At approximately 11:45 a.m., Prieto entered the basement apartment unannounced. According to the leaseholder, Mr. Hines' mother Brenda Hines, Officer Prieto did not ring the doorbell, ask for permission to enter, explain the purpose of the search, or give her anything to sign upon arrival. Also inside the apartment that day were Ms. Hines' sons Willie and Kevin Hines, her brother Gregory Butler, her cousin Thelma Johnson, Kevin's girlfriend Kimberly Gardner, as well as neighbor Tabitha Pointer and her two minor sons Terrell and Quintin Pointer. Once inside the apartment, Prieto drew his sidearm and ordered several male residents to the ground. Sgt. Terrazas and the other officers followed, handcuffed the male residents, and began their search of the premises.

The investigation lasted roughly one hour, during which time Prieto testified that he found 99 packets of heroin in the battery compartment of a toy truck. Prieto informed Ms. Hines that the officers were going to place her son Willie under arrest, at which time Officer Moore approached Ms. Hines with a consent to search form for her signature. Ms. Hines, without her glasses and unable to read the document, refused to sign it four or five times. Officer Moore explained to Ms. Hines, untruthfully, that the form showed only that the officers had completed their investigation and that her son would later be released from custody if she signed it. As Ms. Hines continued to refuse to sign the form and to ask for the assistance of an attorney, Prieto threatened to take everyone in the apartment to the station as a result of her refusal and called her "ignorant" and "naïve." Ms. Hines ultimately signed the form after her son told her to do so, though she did not understand its significance. Prieto indicated a time of 12:53 p.m. on the form, which, besides Ms. Hines' signature, was otherwise blank when the officers formally arrested Mr. Hines and left the apartment. Subsequent to his arrest, Mr. Hines pled guilty to felony possession of heroin and was sentenced to felony probation.

Within an hour of the officers' departure, Ms. Hines contacted the Independent Police Review Authority ("IPRA") to lodge a complaint against the 263 tactical team. The IPRA investigation began that evening. Over the course of the next six months, IPRA investigators received statements from all of the civilian witnesses and the accused officers. On July 2, 2012, the Superintendent filed charges against Officer Prieto and his colleagues, who were all shortly thereafter suspended from duty. Ultimately, five officers received one-year suspensions, while Officer Prieto and Sergeant Terrazas were dismissed from the Police force.[2]

[2] In separate litigation, Judge Pantle of the Cook County Circuit Court overturned the Board's dismissal of Sgt. Terrazas as violative of his due process rights. *See* 13 CH 10156. That case is now pending before the Appellate Court.

II. Standard of Review

Decisions of the Board may be appealed to the Circuit Court pursuant to the Administrative Review Law, 735 ILCS 5/3-101 *et seq.* (2014). The standard of review for an administrative decision depends on whether the Court is presented with a question of fact or law, or a mixed question of fact and law. *Cinkus v. Village of Stickney*, 228 Ill. 2d 200, 210 (2008). A question of law is reviewed *de novo*. *Id.* A question of fact is reviewed under the manifest weight of the evidence standard. *Id.* When a court must examine the legal effect of a given set of facts, it involves a mixed question of law and fact, and an agency's decision will be affirmed unless it is clearly erroneous. *City of Belvidere v. Ill. State Labor Relations Bd.*, 181 Ill. 2d 191 (1998).

"Findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct." 735 ILCS 5/3-110 (2014). "It is the responsibility of the administrative agency to weigh the evidence and determine the credibility of the witness." *Payne v. Ret. Bd. of the Firemen's Annuity & Benefit Fund of Chicago*, 2012 IL App (1st) 112435, ¶ 53. It is not a reviewing court's function to reweigh the evidence or substitute its judgment for that of the agency. *Cinkus*, 228 Ill. 2d at 210. A court will disturb the conclusions of the agency only when the complaining party establishes clear, plain, and undisputable error in the factual findings. *In re Barry B.*, 295 Ill. App. 3d 1080, 1085 (2d Dist. 1998). This is a heavy burden, though deference to the administrative agency's decision is not boundless. *Devaney v. Bd. of Trustees of the Calumet City Police Pension Fund*, 393 Ill. App. 3d 1, 13 (1st Dist. 2010).

III. The Board's Denial of Officer Prieto's Motion to Dismiss

Prieto first argues that the Board erred when it denied the officers' Motion to Dismiss. In the motion, Prieto, along with the other officers, alleged that the Superintendent's failure to bring charges in a timely fashion violated (1) his right to due process, (2) the doctrine of *laches*, and

(3) General Order 90-03 and Seetion 2-57-070 of the Munieipal Code. In its Decision, the Board denied the Motion to Dismiss in its entirety. As indieated above, the Court will review this question of law under the *de novo* standard, so referenee to the Board's reasoning on this matter is unnecessary.

a. The Superintendent's Delay was Unreasonable

The Superintendent's habitual delay in bringing disciplinary charges is as well-doeumented as it is troubling, and this case is no exception. The record shows that the wrongful conduct alleged in this matter occurred on February 4, 2009. A complaining witness was interviewed by IPRA that very evening, and a Complaint Register ("CR") was opened the next day, on February 5, 2009. Although the CR involved the investigation of seven officers, the universe of complaining witnesses was limited and readily ascertainable, and the record indicates that the last IPRA interview occurred on October 14, 2009, just over six months after initiating the CR. At the end of October 2009, the investigator on the case submitted the CR to the IPRA coordinator for review. Without explanation, IPRA returned the CR to the investigator on January 7, 2011 for "additional investigation." On June 22, 2011, the investigator submitted a final CR report to the IPRA Chief Administrator. Finally in the hands of the Superintendent, the delays continued, and, again without explanation, 13 months passed before the Superintendent levied charges against the offieers on July 2, 2012. At long last, the Board convened the administrative hearing on September 20, 2012.

Altogether, 41 months passed between the date of the ineident and the formal filing of charges, and almost 33 months passed between the last IPRA interview and the filing date. It cannot be seriously disputed that such a timeframe is patently unreasonable. Equally disturbing to the Court is the Superintendent's eontinued failure to justify the exeessive, years-long lapses

in police disciplinary actions such as the case at bar. Nonetheless, and most fortunately for the Superintendent, unreasonable delay alone, without measurable harm, does not constitute a due process violation, nor can it support the affirmative defense of *laches*. *See People v. Fisher*, 184 Ill. 2d 441, 459-60 (1998); *Sundance Homes v. County of DuPage*, 195 Ill. 2d 257, 270 (2001).

b. Due Process & Laches

The constitutional safeguard of due process and the equitable defense of laches are united by a foundational principle: Beyond establishing his interest in continued employment as a Chicago Police Officer, Petitioner must exhibit harm or prejudice to that interest as a result of the Superintendent's unreasonable delay. *Fisher*, 184 Ill. 2d at 459-60; *Sundance Homes*, 195 Ill. 2d at 270. While Illinois law is clear "that every citizen has the right to pursue a trade, occupation, business or profession," *Lyon v. Dep't of Children and Family Services*, 209 Ill. 2d 264 (2004), Prieto has not met his burden to demonstrate injury to his employment.

In regards to due process, Prieto's Motion to Dismiss relied heavily on the oft-cited Illinois cases of *Lyon*, 209 Ill. 2d 264 (2004), *Morgan v. Dep't of Fin. and Prof'l Regulation*, 374 Ill. App. 3d 275 (1st Dist. 2007), and *Stull v. Dep't of Children and Family Services*, 239 Ill. App. 3d 325 (5th Dist. 1992). In each of these cases, courts ruled that delays in adjudication resulted in the violation of due process, as the petitioners were unable to pursue their respective employments during the pendency of the matter. Unlike the plaintiffs in those cases, however, Petitioner maintained his employment as a Chicago Police Officer throughout the entirety of the investigation and the intervening years preceding his formal indictment and suspension. Nothing in the record suggests that his job status was adversely affected either by the investigation or during the interim period before charges were levied. There is no indication of any pay reduction, work-related discipline, or reassignment; to the contrary, the record indicates that

Prieto was actually promoted to the Department's Organized Crime Division during this period. Petitioner is thus unable to identify any deprivation of his due process interest in employment that he suffered as a result of the delay, substantial though it may have been.

Concerning the equitable defense of *laches*, Petitioner contends that the significant delay observed in this case prejudiced his trial right to the extent that his prosecution should be barred. Again, however, Prieto is unable to exhibit harm. Petitioner argues, pulling specific examples from the hearing transcript, that minor discrepancies in the witnesses' accounts of the incident illustrate how memories fade with the passage of time and hinder the fact-finder from ascertaining the truth. Yet the record does not bear out this contention, as the witnesses all provided IPRA statements close in time to the events in question, and the hearing transcript shows that their memories at the hearing remained predominantly intact. Nor has Petitioner shown that potentially exculpatory, independent witnesses could have been pursued or that evidence degraded over the preceding years, as was the case in Judge Pantle's decision, *Orsa v. City of Chicago Police Board*, 11 CH 8166. Petitioner is therefore unable to show any measurable prejudice due to the Superintendent's delay that would invoke the doctrine of *laches*.

c. General Order & Municipal Code

This Court is not alone in its concern about the lengthy delays in police disciplinary actions. The City Council passed Municipal Ordinance 2-57-070, which requires that IPRA conclude its investigation within six months or report the reasons for not doing so to the Mayor, Council, the complainant, and the officer involved. The Chicago Police Department, ostensibly sharing similar concerns, endorsed General Order 93-03, which requires prompt investigation within 30 days of a complaint. That deadline may be extended upon application by the investigator.

Prieto urges this Court to hold IPRA and the Superintendent accountable to these statutory and administrative provisions, and argues that violation of these provisions requires dismissal of the charges against him. While the Court is sympathetic to that line of reasoning, the facts of this case do not warrant such an extraordinary result. The record indicates that IPRA complied with both provisions by notifying all relevant parties and by attaining reauthorization within the acceptable time period. Moreover, neither the language of these provisions, nor any legal precedent specifies the consequences of non-compliance. In conjunction with the fact that Prieto is unable to show any harm due to the delay, this Court is unable to dismiss the charges against him for the Superintendent's failure to comply with the spirit of these provisions.

Accordingly, even in light of the Superintendent's needless delay, this Court must affirm the Board's decision to deny Prieto's Motion to Dismiss.

IV. Manifest Weight of the Evidence

Prieto next argues that the Board's Decision sustaining numerous charges against him is against the manifest weight of the evidence. Prieto not only criticizes the Board's credibility determinations, he also attacks the sufficiency and propriety of the evidence utilized by the Board as the basis for its findings. More specifically, Prieto deplores the Board's decision to credit the testimony of Ms. Hines and two household witnesses over his own testimony and that of the other officers. He further calls into question the validity of GPS evidence, as well as evidence relating to Mr. Hines' subsequent criminal conviction and the purported location of the heroin found during the search.

a. The Board's Decision

In its Decision, the Board concluded that the officers (1) entered the Hines' apartment without lawful authority, (2) mistreated Ms. Hines, (3) coerced Ms. Hines into signing the

consent to search form, and (4) conducted an unconstitutional search. The Board additionally found that the officers then made false statements to IPRA and under oath at the Police Board hearing in an apparent attempt to cover up their misconduct. The Board based these findings on "the credible testimony of several residents of the apartment and on corroborating evidence presented at the hearing…which the Board [found] accurate and convincing."

It is evident that the Board placed extraordinary trust in the complainant, Brenda Hines, whose hearing testimony was explicitly credited regarding the events of that afternoon, particularly as to the officers' alleged failure to obtain written consent before entering the household.[3] In light of the radically opposing versions of events set forth at the hearing by the complaining witnesses and the accused officers, the Board supported its findings with four pieces of what it considered to be objective, corroborating evidence.

First, the Superintendent introduced extensive GPS evidence, elucidated by several experts, regarding the location of the two police vehicles operated by the 263 tactical team on the date in question. The Board held that the GPS evidence "unquestionably" showed that the vehicles arrived at the residence at 11:44 a.m. and remained stationary until 12:56 p.m. As Prieto indicated 12:53 p.m. as the time the Consent to Search form was signed, the Board found the GPS evidence consistent with Ms. Hines' testimony that consent was obtained only minutes before the officers left the apartment, not when they arrived at the building as they had all attested. This contradicted Prieto's testimony that he merely identified the time at which Sgt. Terrazas called the search in on the radio, testimony that was further contradicted by Sgt. Terrazas' indication that the officers did not arrive at the apartment until 12:53 p.m. and impeached by Prieto's own IPRA statement that he obtained consent at 12:53 p.m. The Board

[3] Ms. Hines' testimony also formed the primary basis for the Board's finding that Sgt. Terrazas was on scene, directly contradicting and ultimately defeating the Superintendent's allegation that he was absent from the investigation in contravention of the Rules of Conduct.

continued to attack Prieto's credibility by citing a civil jury verdiet entered against him and another tactical officer for illegal seizure and wrongful arrest, a maneuver which will be addressed below.

The second piece of corroborating evidence relied upon by the Board was the consent to search form itself. The Board stressed that the form was the critical legal document providing these officers with their sole authority for entering and searehing a family's private residence without a warrant. The Board underscored the importance in the propriety and accuracy of consent forms, not only to protect the rights of citizens, but also to protect officers from unfounded claims of abuse. In this case, the Board determined that the form only further substantiated the allegations of abuse, as the Board held that the form contradicted the officers' testimony regarding the time consent was obtained.

Third, the Board rejected Prieto's assertion that he found the 99 packets of heroin in the battery compartment of a toy truck. The Board adduced from pictures of the retrieved heroin that it would be impossible for that number of baggies to fit into such a compartment, no matter how tightly wrapped. The Board posited that the toy truek eould have had an unusually large compartment, but faulted the officers for failing to inventory the item. Based on a demonstrative battery compartment deemed similar to the one in question, and further fortified by Ms. Hines' testimony that the battery compartment was small, the Board applied its "common experience with such trucks" in order to find that the compartment was too small for so mueh heroin, further undermining Prieto's credibility.

The Board's fourth and final source of corroboration for its finding that the officers performed an illegal search was the fact that Willie Hines pled guilty to the charge of felony possession of heroin. The Board questioned this outcome, noting that Mr. Hines had two prior

drug related felony convietions and had, in this instanee, been eaught with a large quantity of easily distributable heroin. The Board eonjeetured that the eriminal eourt must have known something was legally awry with the offieers' investigation of the apartment and accordingly allowed Mr. Hines to enter into a redueed plea agreement, going so far as to state that "Brenda Hines and her family were not alone in eoneluding that the seareh of 4740 S. Prairie was not done with consent."

The Board ultimately concluded that Prieto and the 263 tactical team "intentionally and with forethought entered Brenda Hines' home knowing they did not have lawful authority to do so...On the way out, they subverted the Fourth Amendment and undermined all it stands for when they threatened [her] into signing a eonsent to search form." The Board added that this event was "no inadvertent oversight or overzealousness – this was calculated, intentional, unlawful behavior..." Finally, the Board decried the officers for "compound[ing] their problems by deciding to lie their way out of the case..."

b. Testimonial Corroboration of Brenda Hines is Lacking

Petitioner attacks the Board's finding that Ms. Hines' version of events is credible because her testimony was corroborated by "several residents of the apartment." While this Court is severely limited in its review of the Board's eredibility determinations, *Robbins v. The Bd. of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 538 (1997), it is conspicuous that, of the eight other residents of the apartment on the date in question, the Board was able to find only two who supposedly corroborate Ms. Hines' testimony. According to the Board, Tabitha Pointer eorroborated "part" of Ms. Hines' testimony, but a close review of Ms. Pointer's testimony reveals absolutely nothing regarding the issue of consent; the topie is never addressed on either direct or cross-examination. By her own testimony, Ms. Pointer was not even

present when the officers entered the apartment or when they arrested Mr. Hines and departed the premises. Ms. Pointer's limited testimony concerns the timeline of her arrival and which officers were present during the search, but sheds little light on what happened that day.

The Board then cited Kimberly Gardner as corroborative of Ms. Hines' testimony, but, once again, Ms. Gardner's testimony regarding the issue of consent is scant. When asked the vague question on direct examination if she "heard [the officers] make any statements that involved the word 'paper' to Brenda Hines," Ms. Gardner admitted that the parties speaking were around the corner and out of view, that she "couldn't hear everything," and that she could not identify any officer in particular who asked Ms. Hines to "sign the paper." The record indicates that Ms. Gardner, like Ms. Pointer, was also not present when Ms. Hines encountered the officers upon their arrival and that she spent the balance of the investigation in the hallway, unable to see the events as they unfolded.

The Board then took the drastic measure of completely disregarding the lengthy testimony of the only two other civilian witnesses the Superintendent put forth, the target of the search, Willie Hines, and his brother Kevin Hines, as "[t]heir felony drug records impair their credibility, and their testimony is not necessary to resolve this case."[4] Rather than give even qualified weight to over 150 pages of testimony, the Board chose to cherry-pick the two witnesses it regarded as corroborative of Ms. Hines' testimony, even though the record shows meaningful corroboration to be wanting.

Recognizing the weak testimonial foundation for their Findings and Decisions, the Board prudently noted, "[t]his case…is not one where the Board is left only with testimonial evidence

[4] It is noteworthy that Willie Hines directly contradicted his mother's testimony regarding the issue of whether Sgt. Terrazas was on scene, testifying, after viewing photo arrays, that the Sergeant was present only at the police station. In fact, in its closing argument, the Superintendent strenuously argued that Brenda Hines must have been mistaken regarding this issue, but the Board rejected this argument and found the Sergeant present at the scene.

and must choose whom to believe, as between witnesses offering radically different accounts of what happened." The Board attempted to mend this deficiency by observing, "[t]here is *objective evidence* in this record that leads the Board to not believe the testimony of the respondent officers." (emphasis added). The Court will now address these items in the context of the critical issue tackled by the Board and to be resolved by this Court: "[W]hether the Officers violated citizens' Fourth Amendment rights by conducting an illegal search of a private residence..."

c. The Board's Improper Speculation

The Board explicitly rejected Prieto's claim that he discovered 99 packets of heroin in the battery compartment of a toy truck, undermining his credibility and, in the Board's view, corroborating the complainant's version of events. The record indicates, however, that none of the original pieces of evidence that led the Board to this conclusion was available at trial for the Board's inspection. The Board adduced from pictures of the retrieved heroin, which apparently remained in the Department's vault, that it would be impossible for that number of baggies to fit into the toy truck's battery compartment, no matter how tightly wrapped. The Board theorized that the toy truck in question could possibly have had an "unusually large" battery compartment, but chastised the officers for "not bother[ing]" to inventory the original item; yet the Board makes no mention of the fact that neither the IPRA investigators, nor the Hines family ever found it necessary to corral this piece of evidence during the extensive investigation of the officers. Instead, the Board deemed it appropriate to rely on a demonstrative toy truck with a smaller battery compartment that, nevertheless, the Board judged similar to the one in question.

The Board was seemingly fortified by Ms. Hines' testimony that the battery compartment only held four AA batteries, even though she admitted that the compartment was empty at the time of the search. Ultimately, the Board applied its "common experience with such trucks" in

order to find that the compartment was too small for so much heroin and held Officer Prieto's claim to be "incredible." The only thing incredible about this scenario, however, is the Board's confidence in unfounded evidence and its own "common experience with such trucks," which is nothing more than an exercise in conjecture. The trier of fact is not permitted to speculate, but must base its decision on real, competent, and substantive evidence. *People v. Jones*, 174 Ill. 2d 427, 430 (1996) ("While it is not difficult to speculate, as did the trial judge, that the remaining three packets may have contained cocaine, such a finding must be based on evidence and not upon guess, speculation, or conjecture.").

The Board continued its guessing game when it hypothesized that Mr. Hines' criminal prosecution was overshadowed by the specter of an illegal search. The Board suggests that the prosecutors and criminal court judge must have had a sense that valid consent was lacking, otherwise a convicted drug felon found with 99 packets of heroin would never have been allowed to enter into a plea agreement on the charge of felony possession with a sentence of felony probation.[5] The Board goes so far as to remark, "Brenda Hines and her family were not alone in concluding that the search of 4740 S. Prairie was not done with consent." Although tribunals are permitted to utilize some level of institutional knowledge in the decision making process, there must be at least some basis for their finding in the evidentiary record. In this instance, there is a complete dearth of evidence in the record that would allow the Board to come to such a conclusion. The transcript of the criminal proceeding offers not even a hint of the Board's grossly speculative finding that Willie Hines received a plum deal as a result of some consensus in court that the officers on the case had performed an illegal search.

[5] The Board insists that Mr. Hines received substantial leniency when the original charge against him was amended. The Board admits, however, that the original charge is not clear from the record (and it is not). Nevertheless, the Board states in a footnote that Mr. Hines testified that the original charge was possession with intent to deliver, the same Mr. Hines whose testimony the Board blanketly disregarded based on his criminal history.

There is no indication that Mr. Hines' attorney ever moved to suppress the evidence against his client, and Mr. Hines never took any action to appeal his felony conviction, which to this day remains a part of his criminal history. There exist any number of reasons why Mr. Hines reached a plea agreement, but without a trace of evidence in the record as to why such an outcome was reached, it was highly improper for the Board to speculate about that result. Though it was "particularly troubling [to] the Board" that an "an alleged drug dealer…ended up back on the street," it is even more disconcerting to this Court that the Board would exhibit such a level of rank speculation and unsound judgment. Again, a trier of fact cannot make up evidence, nor wish it into existence. In making its Decision, the Board must rely on real evidence, not make believe evidence. *Jones*, 174 Ill. 2d at 430.

d. The Board Did Not Err on the Critical Issue

The Board erred when it used these pieces of speculative evidence to substantiate its findings and to undermine Prieto's credibility. Nevertheless, the Court must find these issues to be collateral to the critical inquiry. Even if the Court were to disregard these suspect conclusions, the Court must still uphold the Board's ultimate finding that Officer Prieto is guilty of performing an illegal search as supported by the manifest weight of the evidence. The credibility of Brenda Hines' testimony, corroborated by the GPS evidence and consent to search form, in conjunction with the repeated contradiction of the officers' version of events, support the Board's ultimate finding.

In order for the Court to overturn the credibility determinations of the Board, it must be convinced that an error was made. The Court is not permitted to reverse the agency's determinations simply because "an opposite conclusion is reasonable or [because] the reviewing court might have ruled differently." *Robbins*, 177 Ill. 2d at 538. There is little in the record that

would call into question the credibility of Ms. Hines' testimony. Her testimony at the Board hearing scarcely wavered from the statement she provided to IPRA more than two years prior. She rarely contradicted herself and her testimony on the witness stand remained unscathed by efforts at impeachment. As such, this Court has no grounds to question the Board's trust in the veracity of Ms. Hines' version of events, which drastically conflicts with the story painted by the officers.

But the complainant's testimony is not the only, or even most reliable, source of corroboration for the Board's crucial finding that consent was not obtained until after the officers performed the search. The GPS evidence, thoroughly dissected by the Superintendent's well-credentialed experts, compellingly establishes that the two vehicles used by Prieto's tactical team arrived at the apartment's location at 11:44 a.m. and departed at 12:56 p.m. This timeframe is wholly consistent with the Ms. Hines' testimony that the officers arrived around 11:45 a.m., searched the household for approximately an hour, and pressured her into signing the consent to search form immediately before departing. The consent to search form's indication of 12:53 p.m. as the time it was signed rounds out a narrow but reliable evidentiary record that is directly contrary to Prieto and his fellow officers' attestations. Prieto and several officers testified inconsistently regarding the consent form's time stamp, and it was not error for the Board to discredit that testimony.[6]

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[6] The Board concludes that both pieces of evidence support Ms. Hines' version of events and discredit Officer Prieto's explanations, but, as is indicative of the Board's overreaching in this case, the Board additionally found that Prieto's credibility was compromised by a jury verdict entered against him and another officer for illegal seizure and wrongful arrest in an entirely unrelated matter. This Court knows of no rule of evidence that would allow the Board to impugn Officer Prieto's credibility using a jury verdict in a civil suit, and it was wholly improper for the Board to use it for such purposes. While it is true that Prieto put forth substantial character evidence, it is not possible to characterize this jury verdict as rebuttal evidence, certainly not as to his reputation for truthfulness. Citing this jury verdict in a *civil rights* lawsuit, not once but twice, as a means to assail Officer Prieto's credibility was completely improper. *See* Fed. R. Evid. 608(b) ("Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's

Although the Board's Decision is rife with speculation and improper evidence, its finding on the critical issue in this case is factually supported by those parts of the record that are free from the cloud of impropriety. After this Court disregards certain serious but ultimately collateral matters, it is left with the distinct conclusion that Officer Prieto and his colleagues performed an unconstitutional search of the Hines' household and subsequently made material misrepresentations regarding that day's events. Therefore, the Court holds that the Board's finding of Prieto's guilt is not against the manifest weight of the evidence.

V. Arbitrary and Capricious

Prieto lastly argues that, even if there is a sufficient basis to affirm the Board's finding that he and the other officers performed an illegal search, the Decision should still be overturned because termination from duty is an arbitrary and capricious punishment in light of the circumstances presented by this case.

A court's review of an agency's decision to terminate an employee is a two-step process. *Walsh v. Bd. of Fire and Police Commissioners of Orland Park*, 96 Ill. 2d 101, 105 (1983). First, the court must determine whether the agency's finding of guilt is contrary to the manifest weight of the evidence. *Id.* Second, the court must determine whether the agency "acted unreasonably or arbitrarily by selecting a type of discipline that was inappropriate or unrelated to the needs of the service." *Siwek v. Police Bd. of Chicago*, 374 Ill. App. 3d 735, 738 (1st Dist. 2007). In order to justify discharge, the agency must identify "just cause," which is defined as "some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the

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character for truthfulness."); *see also Graniczny v. City of El Paso*, 809 F. Supp. 2d 597 (W.D. Tex. 2011) (Police officer's disciplinary record was not admissible in 42 USCS § 1983 action arising from arrestee's fatal fall from rooftop; officer's prior acts were not probative of his character for truthfulness or untruthfulness for purposes of Fed. R. Evid. 608(b)). Nevertheless, Officer Prieto and the other officers' repeated contradiction and impeachment, as well as a history of making false statements during the course of this matter, support the Board's finding that Prieto's timeline regarding consent is not credible.

discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer holding the position." *Krocka v. Police Bd. of Chicago*, 327 Ill. App. 3d 36, 47 (1st Dist. 2001). Having found the question of guilt supported by the record, this Court must now consider whether the Board's findings provide a sufficient basis for its decision to discharge Officer Prieto.

In reviewing an agency's decision to terminate, a court may not consider whether it would have imposed a more lenient disciplinary sentence. *Wilson v. Bd. of Fire and Police Commissioners of Markham*, 205 Ill. App. 3d 984, 992 (1st Dist. 1990). As stated above, the court's review is limited to a determination of whether the Board acted arbitrarily or unreasonably by selecting a discipline that was inappropriate. *Id.* Though generally courts may not compare sanctions dispensed in unrelated cases, courts are permitted to consider disparate penalties in cases that are "completely related," as is the case here. *Id.*

In *Wilson*, two Markham police officers, a sergeant and a patrolman, became embroiled in a physical struggle in the police station. *Id.* at 987-88. Charges were filed against each and after separate trials before the Board, both men were found guilty. *Id.* at 988-89. That is where the similarities in their treatment end. At sentencing, the sergeant received a 30-day suspension, while the patrolman was discharged. *Id.* One scuffle, two combatants, and two findings of guilt resulted in two grossly disparate punishments. Noting the severe disparity in sentencing, the Appellate Court remanded the consolidated cases to the Board:

> "Although we believe that neither of the Board's actions, *i.e.*, either the 30-day suspension of Wilson or the discharge of Tolbert, if viewed separately, could be considered inappropriate or arbitrary. When considering the fact that the events surrounding these cases were completely related, there appears to be a gross disparity or disproportionality between the two sanctions. For this reason, we believe that a new hearing on sanctions is warranted." *Id.* at 992.

In differentiating Officer Prieto's more severe punishment from that of the other officers, the Board justified his termination on the grounds that he was "quite clearly the leader" of the illegal search of the Hines residence. The Board further emphasized that he was the "operative force" behind the investigation, that he "threatened and seriously mistreated" the residents of 4740 S. Prairie, and that he lied to IPRA and the Board about obtaining consent to search. In contrast, the Board suspended the five remaining officers for one year because, although they too lied to IPRA and the Board, their role "was neither that of a supervisor or a leader." According to the Board, the suspended officers "played a minor role in the planning and execution" of the search and did not threaten or significantly mistreat the residents of the apartment.

The Board made these conclusions even in light of its finding that Sergeant Terrazas, the tactical team's supervising officer, was present at the scene during the entirety of the search; the man from whom Ms. Hines sought permission to change her clothes and to continue her cooking and who granted Ms. Pointer permission to leave the apartment with her younger son. The Board singled out Prieto as the ringleader of the effort to pressure Ms. Hines into giving consent, even though the record shows that it was in fact Officer Moore who approached Ms. Hines with the consent to search form, repeatedly lied to her about its contents and legal significance, and was also found guilty of threatening the residents with arrest and coercing Ms. Hines into signing the document.

The Board decries Officer Prieto for "terrorizing" the residents of the apartment, when in the same opinion it found him not guilty of all but three of the 15 charges against him for the disrespect or maltreatment of any person (Rule 8), unjustified verbal or physical altercation with any person (Rule 9), and the unlawful or unnecessary use or display of a weapon (Rule 38).

With similar inflammatory language, the Board characterized Ms. Hines' testimony as relating that Prieto "burst into the apartment," when in reality she never described his entry into the apartment in such words; rather, she simply stated, "A man had entered the door by swinging -- turning the door knob on the screen and just came in the house." Ultimately, the Board found Prieto not guilty of the balance of the charges levied against him, 21 out of 40, and those that it sustained against him are often entirely duplicative.

In this case, the Board found that seven Chicago police officers participated in a warrantless search of a residence and then lied about it in an attempt to cover up their collective misdeeds. Of the seven officers, all were patrolmen except Sgt. Terrazas, whom the Board recognized in its Decision as the "supervisor with responsibilities." In handing out punishment, the Board is stuck with the facts as they relate to all the officers. Officer Prieto was **not** a supervisory officer on February 4, 2009, and the Board cannot magically transform him into one by anointing him the "leader" of the operation. Prieto received the information regarding the drugs, passed that information along, and acted upon it together with six other officers, one of whom was indisputably a supervising sergeant.

The Board found that the five other tactical officers performed an illegal search and lied to IPRA and the Board just like Officer Prieto did. Those five officers received one-year suspensions, while Prieto received the ultimate sanction of discharge. There is not a sufficient basis in the record to support such grossly disproportionate penalties. The **competent** evidence shows this was a team operation with one supervisor on the scene – Sgt. Terrazas. The Board cannot promote Prieto to sergeant by labeling him the "leader." More importantly, the Board cannot dispense sentences in a vacuum while ignoring the seamless course of events of February 9, 2009 that joins these officers together at the hip. The Court finds that this action by the Board

fits squarely within the definition of arbitrary and capricious. The Court does not condone Officer Prieto's conduct, but in light of the serious disparity between his termination and his five fellow patrolmen's yearlong suspensions for their joint conduct, this Court believes the Board must revisit the issue of sanction in this case. Therefore, the Court overturns the Board's imposed termination of Officer Prieto and remands this matter to the Board for the sole purpose of revisiting the issue of sanction.

WHEREFORE, IT IS HEREBY ORDERED:

(1) Plaintiff's Petition for Administrative Review is GRANTED.

(2) This matter is REMANDED to the Police Board solely for reconsideration of Plaintiff's termination with instructions to impose a lesser penalty.

(3) This is a final and appealable order.

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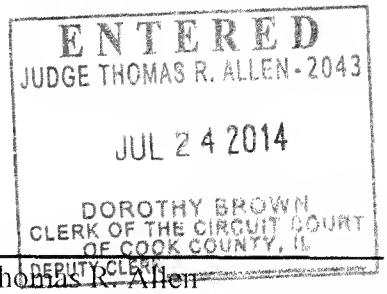

Judge Thomas R. Allen